FROM THE SUPREME COURT:

OVERSEAS MILITARY MEDICAL MALPRACTICE CLAIMS

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Congress amended the Federal Tort Claims Act (FTCA) in 1988 with a provision that is referred to as the Federal Employees Liability Reform and Tort Compensation Act (Liability Reform Act).[1] This legislation affects military physicians overseas and, in fact, seeks to insulate them from personal suit. The following discussion of this law may be helpful to military physicians who serve overseas.

This legislation was intended to address specifically a 1988 United States Supreme Court decision that had created a potentially broad avenue of exception to the application of the standard doctrine of official personal immunity for the actions of U.S. government employees taken within the scope of their employment, when those actions are claimed to have caused personal injury.[2] The Supreme Court case involved the disposal of toxic substances by federal government supervisors. The Court initially noted that it was compelled to review the dispute in the absence of a directly applicable statute. Analyzing common law, the Court ultimately determined that no single rule of absolute official immunity for federal government officers could be judicially formulated. Rather, such disputes would need to be resolved on a case-by-case basis. Immunity might be granted in one circumstance while not in another, given the determination of a single broadly-based inquiry: whether or not the potential harm to individual citizens was outweighed, in a particular context, by the need to grant official immunity as a contribution to effective government.

The subsequent enactment by Congress of the Liability Reform Act addressed this potential for imposing personal liability upon federal employees for acts taken within the scope of their employment. The statute calls for absolute immunity for federal employees with regard to such official acts; it then serially sets out relief under the FTCA as the exclusive legal remedy in such circumstances; and it preserves the rights of the government, to include available exceptions and defenses under the FTCA, in the resolution of any such subsequent dispute. Further, the legislation establishes only two somewhat highly specialized circumstances as designated exceptions to its application to the official actions of federal employees.

In May 1991, the Supreme Court decided a case regarding the effect of the 1988 Liability Reform Act upon a claim of medical malpractice regarding care rendered in an overseas military hospital.[3] Factually, the case involved the provision of obstetrical services in Italy to the dependent wife of an active duty military member. In time, the claimants filed a personal suit in a federal district court against the attending active duty military physician, alleging negligence during labor and delivery with consequent brain damage to their son. The government intervened, requesting its substitution as the only defendant, consistent with existing law, and then petitioned for dismissal of the litigation chiefly upon the basis that the FTCA excepts any grant of relief against the government for injuries that arise for actions taken outside the United States. The district court granted these motions.

Appeal was taken to the United States Court of Appeals for the Ninth Circuit where, in 1989, subsequent to the passage of the Liability Reform Act, the lower court was reversed.[4] The appellate court ruled that the Gonzales Act and the Liability Reform Act could not be jointly employed to

grant immunity to federal officers when the serial application of the FTCA would provide no legal relief for claimants. In turn, and as a result of a division of opinion among the federal appellate courts, the Supreme Court agreed to review the case to decide the sole question of how the Liability Reform Act applied in such a circumstance.

Writing for a near unanimous court, with a single justice in dissent, Justice Marshall concluded that the plain language employed by Congress could be interpreted to mean only that, in a case such as that before the Court, the Liability Reform Act effected an absolute immunity for federal officers and the exclusive potential remedy was the serial application of the FTCA, with the government retaining all FTCA defenses and exceptions, even those that might eventuate in dismissal of the petitioner's claim. The drafters of the statute had envisioned and specified only two relatively technical exceptions to its grant of absolute personal official immunity, and neither was applicable to the facts of this case.

To set this decision in proper context, in recent years, a number of cases have arisen where claimants brought personal suits against active duty military medical officers for alleged malpractice occurring in overseas facilities. While the government could eventually indemnify an officer so named, if necessary, the specter of personal liability remained a concern. The actions taken by Congress and the Court have conclusively addressed this issue, and the absolute official immunity for federal officers from personal suits arising in such a context will not likely be undone.

REFERENCES

1. Public Law No. 100-694, 102 Stat. 4563 (1988); 28 USCA 2679(b), 28 USCA 2679(d).

2. *Westfall v. Erwin*, 484 US 292, 108 S.Ct. 580 (1988).

3. *United States v. Smith*, __,US__, 111 S.Ct 1180 (1991).

4. *Smith v. United States*, 885 F.2d 650 (9th Cir. 1989).